

01 BACKGROUND

02 Plaintiff and defendant have somewhat different versions of the facts underlying this
03 lawsuit.¹ Both parties agree, however, on the fundamental outline of the incident in question. On
04 August 5, 2005, plaintiff was incarcerated on the tenth floor of the Jail.² (Dkt. #65 at 2).
05 Corrections Officer Theodore Larson, the sole defendant here, was on duty and let plaintiff out
06 of his cell twice that day. The first time plaintiff was let outside for recreation and remained
07 outside for approximately seventy minutes. The second time, plaintiff was released into the
08 “dayroom” where he could choose to either take a shower or use a telephone. Plaintiff chose to
09 use a telephone and did so for approximately forty minutes when a detail of officers arrived to
10 escort plaintiff to court. (*Id.*)

11 Plaintiff returned from court at 1:05 p.m. and reentered his cell.³ (*Id.*) From this point on,
12 the parties’ versions of the facts differ. Plaintiff alleges that because he had missed the opportunity
13 to take a shower, he asked Officer Larson if he could take a quick shower before returning to his
14 cell. (Dkt. #66, Ex. C). According to plaintiff, Officer Larson replied that he could not because
15 his recreation time had elapsed. (*Id.*) Plaintiff then asserts that he told Officer Larson that he
16 would wash up in his cell, using the water in his sink. Officer Larson allegedly responded, “No,

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18 ¹ Plaintiff’s version is largely based upon declarations submitted by plaintiff and two
19 inmates who witnessed the incident: Douglas E. Gallagher and James Buxton. (Dkt. #7, Ex. B
and C; Dkt. #66, Ex. C). Defendant’s version is based upon his own declaration. (Dkt. #65).

20 ² The record does not disclose the nature of the charges that plaintiff was facing, nor
21 whether he was eventually convicted of any offense. The Court notes that plaintiff is currently
incarcerated in the Southern New Mexico Correctional Facility in Las Cruces, New Mexico.

22 ³ Plaintiff states that he returned from a medical appointment (Dkt. #66 at 2), instead of
an appearance in court, but this difference is immaterial to his claim here.

01 you won't." (*Id.*) Despite this command, plaintiff proceeded to wash himself in his cell; Officer
02 Larson saw this and again commanded him to stop. Plaintiff responded, "You can't stop me from
03 washing myself." (*Id.*) Officer Larson replied, "Want to make a bet?" (*Id.*) Officer Larson then
04 turned off the water supply to plaintiff's cell and allegedly told him, "Your [sic] going to burn in
05 hell, you better take some barbecue sauce with you it's going to be hot!" (*Id.*) Plaintiff also
06 contends that defendant told him that his water would not come back on for "a long, long time."
07 (Dkt. #66, Ex. C).

08 Over the course of the next 30 hours, plaintiff alleges that he repeatedly complained about
09 being thirsty and about his cell smelling bad from the accumulation of feces and urine in his toilet.
10 (Dkt. #66, Ex. C at 2). After 30 hours, plaintiff fainted. (Dkt. #52, Ex. G at 2). He was treated
11 by a nurse in his cell, who revived him by giving him drinking water and instructed him to request
12 further medical treatment if he did not feel better the next day. (Dkt. #66 at 2). Plaintiff claims
13 that he hurt his back when he fainted and that he suffers from back pain to this day. (*Id.*) Shortly
14 after the nurse saw plaintiff, at approximately 8:00 p.m. on August 6, 2005, corrections officers
15 turned the water back on in plaintiff's cell.⁴

16 Defendant alleges, in contrast to the version of the facts recounted above, that plaintiff
17 started complaining loudly to him after he returned from court that he had been unable to shower.
18 (Dkt. #65 at 2). Defendant alleges that after he told plaintiff that he was not permitted to wash
19 up in his cell, plaintiff cursed at him and threatened to flood his cell. (*Id.*) According to
20 defendant, he warned plaintiff that if he flooded his cell, then defendant would turn off the supply

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22 ⁴ Defendant's shift ended at 2:25 p.m. on the preceding day, August 5, 2005, and he did not return to work on plaintiff's floor until August 18, 2005. (Dkt. #65 at 4).

01 of water to his sink and toilet. (*Id.*) Despite this warning, defendant alleges that he saw plaintiff
02 at approximately 1:15 p.m. in his cell, “naked, splashing water from his running sink all over his
03 cell floor.” (*Id.* at 3). Defendant further states that “[a] pool of water was forming at his cell door
04 and was spreading out into the dayroom.” (*Id.*) Defendant then turned off the water to plaintiff’s
05 cell. (*Id.*) Further, defendant imposed an additional sanction by noting in a log book maintained
06 by corrections officers that plaintiff would lose an hour of time outside his cell the following day.

07 Defendant does not directly contradict plaintiff’s assertion that he requested and was
08 denied drinking water from Jail officials over the next 30 hours. Instead, defendant maintains that
09 it is “standard procedure” under these circumstances to offer an inmate the opportunity to get a
10 drink outside the cell and to flush his toilet once during a 24-hour period. (Dkt. #65 at 4).
11 Defendant, however, does not offer any specific evidence, such as a declaration by a corrections
12 officer, that plaintiff either requested or was offered such an opportunity during the incident in
13 question.

14 On July 7, 2006, plaintiff filed the instant civil rights complaint, naming Officer Theodore
15 Larson as the sole defendant. (Dkt. #7). Defendants filed their answer on September 11, 2006.
16 (Dkt. #15). On September 12, 2006, the Court issued an Order setting deadlines for discovery
17 and dispositive motions. (Dkt. #16). These deadlines were extended twice at the request of
18 plaintiff. (Dkt. #28 & 36).

19 On May 7, 2007, plaintiff filed a motion for summary judgment. (Dkt. #52). Defendant
20 filed a response on May 29, 2007. (Dkt. #54). On July 17, 2007, defendant filed a motion for
21 summary judgment. (Dkt. #64). Plaintiff filed a response on August 3, 2006. (Dkt. #66). The
22 parties’ motions for summary judgment are now ready for review.

01 DISCUSSION

02 Summary Judgment

03 Summary judgment is proper only where “the pleadings, depositions, answers to
04 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
05 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
06 of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The
07 court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*
08 *O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79
09 (1994).

10 The moving party has the burden of demonstrating the absence of a genuine issue of
11 material fact for trial. *See Anderson*, 477 U.S. at 257. “When the moving party has carried its
12 burden under Rule 56(c), its opponent must do more than simply show that there is some
13 metaphysical doubt as to the material facts. . . .Where the record taken as a whole could not lead
14 a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Scott*
15 *v. Harris*, __U.S.__, 127 S. Ct. 1769, 1776 (2007) (internal citation and quotation omitted).
16 Conclusory allegations in legal memoranda are not evidence, and cannot by themselves create a
17 genuine issue of material fact where none would otherwise exist. *See Project Release v. Prevost*,
18 722 F.2d 960, 969 (2nd Cir. 1983).

19 In order to sustain a cause of action under 42 U.S.C. §1983, plaintiff must show (i) that
20 he suffered a violation of rights protected by the Constitution or created by federal statute, and
21 (ii) that the violation was proximately caused by a person acting under color of state law. *See*
22 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the second prong, plaintiff

01 must allege facts showing how individually named defendants caused or personally participated
02 in causing the harm alleged in the Complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.
03 1981).

04 Defendant argues initially that plaintiff has failed to argue, much less show, that the shut-
05 off of his water for 30 hours violated a federal statute or constitutional provision. (Dkt. #64 at
06 7). Defendant points out that plaintiff relies in his complaint on a Washington regulation (WAC
07 289-20-255-2) as the legal basis for his right to drinking water, a toilet, and a sink. (Dkt. #7 at
08 4). While it is true that plaintiff relies upon this particular regulation in one part of his complaint,
09 he also relies upon the Eighth and Fourteenth Amendments of the Constitution in another part of
10 the complaint. (*Id.* at 22). In addition, plaintiff cites several federal cases in a portion of his
11 motion for summary judgment that he labels, "Memorandum of Law." (Dkt. #52 at 3). Therefore,
12 plaintiff has satisfied the threshold requirement of 42 U.S.C. §1983 that he allege a violation of
13 his federal civil rights.

14 The Eighth Amendment prohibits the cruel and unusual punishment of prisoners, while the
15 punishment of pretrial detainees is prohibited by the Fourteenth Amendment. *Bell v. Wolfish*, 441
16 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to
17 an adjudication of guilt in accordance with due process of law.") Because plaintiff was a pretrial
18 detainee at the time of the events at issue in this case, his substantive claim is reviewed under "the
19 more protective fourteenth amendment standard." *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir.
20 2004) (quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987)). *But cf. Frost v.*
21 *Agos*, 152 F.3d 1124, 1128 (9th Cir. 1998) ("Because pretrial detainees' rights under the
22 Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment,

01 however, we apply the same standards.”)

02 The test for identifying unconstitutional punishment at the pretrial stage of a criminal
03 proceeding requires a court to examine “whether there was an express intent to punish, or
04 ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable
05 for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’”
06 *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 538). “For a
07 particular governmental action to constitute punishment, (1) that action must cause the detainee
08 to suffer some harm or ‘disability,’ and (2) the purpose of the governmental action must be to
09 punish the detainee.” *Id.* at 1029. Further, “to constitute punishment, the harm or disability
10 caused by the government’s action must either significantly exceed, or be independent of, the
11 inherent discomforts of confinement.” *Id.* at 1030.

12 “[M]aintaining institutional security and preserving internal order and discipline are
13 essential goals that may require limitation or retraction of the retained constitutional rights of both
14 convicted prisoners and pretrial detainees.” *Bell*, 441 U.S. at 546. *Accord Jones*, 393 F.3d at 932
15 (“Legitimate, non-punitive government interests include ensuring a detainee’s presence at trial,
16 maintaining jail security, and effective management of a detention facility.”) Moreover,
17 corrections administrators “should be accorded wide-ranging deference in the adoption and
18 execution of policies and practices that in their judgment are needed to preserve internal order and
19 discipline and to maintain institutional security.” *Bell*, 441 U.S. at 547.

20 Thus, the question here is whether defendant’s actions either (1) were expressly intended
21 to punish plaintiff or (2) constituted punishment because they significantly exceeded the inherent
22 discomforts of confinement. The record at this stage of the proceedings does not appear amenable

01 to summary judgment on the former question. Plaintiff alleges that defendant stated that plaintiff
02 would “burn in hell,” and such a statement, if actually uttered, supports a theory that defendant
03 was angry and was trying to inflict punishment on plaintiff. Although defendant does not
04 specifically deny having made this statement, nor does defendant admit it. Moreover, even if
05 defendant had made the statement, the words alone would not conclusively demonstrate that
06 defendant’s action was expressly intended to punish. After all, plaintiff concedes that defendant
07 warned him not to wash up in his cell, and that he proceeded to do so anyway. Defendant’s harsh
08 statement could be viewed as secondary harassment that accompanied a legitimate action taken
09 to preserve internal order and discipline. *Cf. Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir.
10 1987) (verbal harassment alone is insufficient to state a claim under § 1983).

11 The Court reaches a different conclusion regarding the second question, *i.e.*, whether
12 defendant’s actions constituted punishment because the harm caused by the actions significantly
13 exceeded the inherent discomforts of confinement. It is undisputed that defendant’s action
14 deprived plaintiff of drinking water and the ability to flush his toilet for 30 hours. While
15 defendant’s initial decision to turn off plaintiff’s water supply seems a legitimate response to
16 plaintiff’s act of defiance, the continuation of this deprivation for 30 hours seems excessive. At
17 some point, which the Court need not identify here, the disciplinary purpose of the deprivation
18 crossed the line into punishment. Certainly, it cannot be said that depriving an inmate of water for
19 30 hours is an inherent discomfort of confinement. *See Hope v. Pelzer*, 536 U.S. 730 (2002)
20 (Alabama corrections officer violated a prisoner’s Eighth Amendment rights when the prisoner
21 was handcuffed to a hitching post for approximately seven hours in the hot sun); *see also*
22 *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995) (holding that subjecting a

01 prisoner to lack of sanitation that is severe or prolonged can constitute an infliction of pain within
02 the meaning of the Eighth Amendment).

03 In sum, although there is some dispute as to the facts underlying this lawsuit, there is no
04 dispute as to the material facts. Plaintiff used the sink in his cell to wash himself after being told
05 not to do so by defendant. Defendant then shut off plaintiff's water for thirty hours, causing
06 plaintiff to faint and fall in his cell. These undisputed facts amount to punishment under *Bell* and
07 its progeny, and plaintiff is therefore entitled to summary judgment.

08 Relief

09 In his complaint, plaintiff requests relief in the form of "compensatory and punitive
10 damages to be determined at trial." (Dkt. #7 at 23). Under the Prison Litigation Reform Act,
11 plaintiff must show a physical injury in order to qualify for damages for mental or emotional injury.
12 See 42 U.S.C. § 1997e(e). As previously mentioned, plaintiff asserts that he has suffered from
13 back pain since his fall in the cell, and plaintiff attaches numerous exhibits to his complaint that
14 purport to show the extent of this injury. (Dkt. #7, Ex. D-Z). Defendant has not addressed the
15 issue of relief in any of the pleadings filed thus far in this case. In any case, the measure of
16 damages is a question of fact that is better suited to resolution through trial or mediation than
17 through summary judgment. See, e.g., *Advanced Team Concepts, Inc. v. United States*, 77 Fed.
18 Cl. 111, 113 (2007). Accordingly, the Court is unable to recommend what damages, if any,
19 should be awarded to plaintiff.⁵

21 ⁵ In addition to damages, it appears that plaintiff may be entitled to recover the costs
22 associated with this litigation. See 28 U.S.C. § 1920; *Merrell v. Block*, 809 F.2d 639, 642 (9th
Cir. 1987).

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment should be granted and defendant's motion for summary judgment should be denied. Further, to assist the Court in resolving the issue of damages, the Court recommends appointing counsel to represent plaintiff under 28 U.S.C. § 1915(e). A proposed Order accompanies this Report and Recommendation.

DATED this 14th day of September, 2007.



Mary Alice Theiler
United States Magistrate Judge